AIDER BY VERDICT.—The technicalities and niceties of criminal pleading have often been a reproach to the law. An old text-writer laments the fact that "more offenders escape by the over easy ear given to exceptions in indictments, than by their own innocence."[1] Thus the doctrine of aider by verdict, though not considered by this author, arose in an attempt in some measure to relieve against these elaborated distinctions. As a common law doctrine, it exists independently of statute,[2] though it has been regulated by statutes in many States.[3] It applies to criminal as well as to civil pleadings.[4] The decided trend of modern decisions has been toward the enlargement of this doctrine.

In determining the limitations of aider by verdict, it is best to notice first what is required absolutely of an indictment. According to the United States Supreme Court,[5] the indictment must give the accused such a description of the charge against him as will enable him to make his defense, and prevent his being tried again for the same offense; and must furnish the court with such a statement of the facts as to enable it to decide whether the facts are sufficient in law to support a conviction. A complete failure in any of these essentials cannot be remedied by verdict. But there may be minor mistakes and defective descriptions of facts, upon the true statement of which the verdict is necessarily founded. In such case, since the verdict could not have been reached without the proper statement or qualification of these matters, it is presumed by the court that they were properly stated or qualified in the trial. Objection to them cannot be raised after verdict. Thus the defective pleading is cured by the presumption of the court. The court cannot presume, however, that a matter, omitted in the indictment, was properly brought out in the trial, because there is no room for such presumption. Nor could the presence of essential matter in the trial atone for its absence in the indictment, since to allow this would be to defeat the very purposes of the indictment, as stated above. In such case, the prisoner would not be given a proper opportunity for the preparation of his defense, nor would the court be able to decide from the indictment what offense had been committed. The requirements for a proper indictment are thus of assistance in showing the application of aider by verdict. The general rule is that a defective statement may be cured by verdict,[6] but an omission cannot be so cured.[7]

The legal reason for the existence of this doctrine is waiver by the defendant. By a failure to take advantage of the minor de-

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[1] 2 HALE, PLEAS OF THE CROWN, 193.
[2] CLARK, CRIMINAL PROCEDURE, 2d ed., 368.
[3] State *v.* Williamson, 43 Tex. 500.
[4] State *v.* McGee, 81 Conn. 696, 72 Atl. 141.
[5] United States *v.* Cruikshank, 92 U. S. 542, 558. See also Gallagher *v.* People, 211 Ill. 158, 71 N. E. 842.
[6] Woodsmall *v.* State, 179 Ind. 697, 102 N. E. 130.
[7] SHIPMAN, COMMON LAW PLEADING, 155.

fects in an indictment at the proper time, the defendant is held to have waived them.[8] He is not permitted to allow the trial to proceed on an improper indictment and then, after a disastrous termination, to deny the validity of the indictment under which he was willing to be tried.[9] The application of this waiver is well expressed in the syllabus by the court in the Georgia case of *Lanier* v. *State*:[10]

> "Every defendant has the right to be tried upon an indictment or accusation perfect in form and substance, but this right, like every other (even the right of trial itself), may be waived. One who waives his right to be tried on an indictment perfect in form as well as substance, and takes his chances of acquittal, will not be heard, after conviction, to urge defects in the indictment, unless those defects are so great that the accusation is absolutely void."

It is interesting to notice a few of the applications made by the courts of the rule of aider by verdict. Formal defects are those most easily cured. Slight irregularities, such as failure to indorse the names of witnesses on the indictment or to indicate the date when found by the grand jury, are cured by verdict.[11] The rule applies to such formal and technical errors as do not obscure the meaning of the indictment.[12] Objections to the grand jury, in that it was improperly constituted,[13] or that it was too large,[14] come too late after verdict. Nor can an objection on the ground of duplicity be raised after verdict.[15]

The determination of when an accusation containing an insufficient description may be cured by verdict, is slightly more difficult. As a rule, such accusations are cured as are imperfectly stated or stated in general terms.[16] Insufficiency in the description of an article stolen (animal described as "one beef of the cow kind"),[17] or error in such description,[18] cannot be shown after verdict. Nor is insufficiency in charging an offense in the indictment subject to objection after verdict.[19] Of course, these decisions must be taken with the qualification that the description must be sufficiently accurate to apprise the defendant of the offense with which he is charged. Thus an information charging the sale of intoxicating liquors, without specifying the kind of intoxicating liquors, when

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[8] State *v.* Shadwell, 22 Mont. 559, 57 Pac. 281.
[9] Gazaway *v.* State, 9 Ga. App. 194, 70 S. E. 978.
[10] Lanier *v.* State, 5 Ga. App. 472, 63 S. E. 536.
[11] Deberry *v.* State, 99 Tenn. 207, 42 S. W. 31.
[12] Lavelle *v.* State, 136 Ind. 233, 36 N. E. 135.
[13] Green *v.* State, 28 Miss. 687.
[14] See Shropshire *v.* State, 12 Ark. 190.
[15] State *v.* Wilson, 143 Mo. 334, 44 S. W. 722; Morgan *v.* United States, 78 C. C. A. 323, 148 Fed. 189.
[16] State *v.* Knowles, 34 Kan. 393, 8 Pac. 861.
[17] State *v.* Perkins, 49 La. Ann. 310, 21 South. 839.
[18] State *v.* Carter, 51 La. Ann. 442, 25 South. 385.
[19] State *v.* Peak, 130 N. C. 711, 41 S. E. 887.

wines could be lawfully sold, was held to be good after verdict.[20] But an indictment charging the theft of "one hundred and fifty dollars in United States currency" was invalid even after verdict.[21] The rules governing the description of persons and places are similar to those governing the description of the offense. Misnomer can be objected to only by a plea in abatement.[22]

In Virginia, the doctrine of aider by verdict has been replaced by statute. This statute, with occasional modifications, has been in effect for more than a century. The new Code of 1919 provides that: "Judgment in any criminal case shall not be arrested or reversed upon any exception or objection, made after a verdict, to the indictment or other accusation, unless it be so defective as to be in violation of the Constitution." [23] This is in general conformity with the common law doctrine. In the Code of 1904, the form of the statute was that an accusation shall be good after verdict "if the offense be charged therein with sufficient certainty for judgment to be given thereon, according to the very right of the case." [24] The revisors have done away with this slightly elastic concluding phrase.

There are a number of decisions under the earlier statutes. An indictment for a nuisance caused by a mill, which failed to describe the mill or show in what county it was located, was good after verdict.[25] Likewise an indictment against the local agent of a foreign corporation for transacting the corporation's business without a license was good after verdict, even though it misdescribed the corporation.[26]

But where no offense is charged in an indictment, the court cannot look to the evidence to see whether the offense intended to be charged has been proved.[27] Several very early Virginia cases apply the rule of aider by verdict.[28]

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[20] State *v.* Barr, 78 Vt. 97, 62 Atl. 43.
[21] Merrill *v.* State, 45 Miss. 651.
[22] Turns *v.* Commonwealth, 47 Mass. 224.
[23] Va. Code, 1919, § 4879.
[24] Va. Code, 1904, § 4000.
[25] Stephen *v.* Commonwealth, 2 Leigh (Va.) 759.
[26] Slaughter *v.* Commonwealth, 13 Gratt. (Va.) 767.
[27] Rose *v.* Commonwealth, 116 Va. 1023, 82 S. E. 699. See also Johnson *v.* Commonwealth, 111 Va. 877, 69 S. E. 1104; Tisdale *v.* Commonwealth, 114 Va. 866, 77 S. E. 482.
[28] Commonwealth *v.* Offner, 2 Va. Cas. 17; Commonwealth *v.* Moseley, 2 Va. Cas. 154.